

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 83-6285

Supreme Court, U.S.
FILED

MAR 19 1984

ALEXANDER L STEVENS
CLERK

OCTOBER TERM, 1983

GEORGE CLIFTON GILMORE,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MISSOURI

Respectfully submitted,

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IN PFX

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CONSTITUTIONAL PROVISIONS AND STATUTES

Section 565.014.3(3), RSMo 1978, reads as follows:

"3. With regard to the sentence, the supreme court shall determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

"(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

STATEMENT OF THE CASE

Petitioner George Clifton Gilmore was convicted of capital murder, §565.001, RSMo 1978, and received the sentence of death for the murder of an elderly woman, Mary Watters, committed for the purpose of theft. The facts relating to this offense are fully set out in the opinion of the Supreme Court of Missouri affirming petitioner's conviction and sentence, State v. Gilmore, 661 S.W.2d 519 (Mo. banc 1983), and will not be restated here.

The facts and circumstances bearing upon petitioner's request for certiorari are as follows:

During the penalty phase of the trial, the prosecutor argued, in part, to the jury:

". . . and also you have absolutely no guarantee that the legislature down the road, here, won't change its mind, that they won't pass another law saying that you can let someone who has been convicted like this defendant out of jail before the fifty years are up, or the governor could commute his sentence" (Tr. 765).

No objection was made by petitioner's trial counsel; nor was error alleged in the motion for new trial; nor was any complaint regarding this instance raised on appeal to the Supreme Court of Missouri. Accordingly, petitioner's theory regarding improper argument has never been presented to any Missouri court.

Petitioner raised his claim regarding a lack of proportionality of his death sentence to the Missouri Supreme Court, which considered and rejected petitioner's allegations. At no time did petitioner claim his death sentence was cruel and unusual punishment and a violation of the Eighth Amendment to the United States Constitution.

ARGUMENT

Petitioner's first issue asserts that the Supreme Court of Missouri failed to declare erroneous, under state law, the prosecutor's statement regarding possible parole or clemency. Certiorari on this ground should be denied for two reasons. The first, as petitioner correctly notes, is that no federal constitutional claim is ~~stated~~ stated. California v. Ramos, ___ U.S. ___, 103 S.Ct. 3446, ___ L.Ed.2d ___ (1983).

The second is that the issue of the prosecutor's comments has never been raised in a Missouri court. As petitioner admits, no objection was made at trial (Petition, p. 4). Further, this issue was not briefed on appeal to the Supreme Court of Missouri by either petitioner's appellate attorney or by petitioner himself. The Supreme Court of Missouri makes no reference to the issue in its opinion, 661 S.W.2d 519 (Mo. banc 1983).

As this Court has observed,

"It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system (citations omitted)."

Webb v. Webb, 451 U.S. 493, 496-497 (1981).¹

Petitioner's other complaint states, in sum, that the Supreme Court of Missouri did not reach the correct result when considering the proportionality of the sentence in accordance with Missouri law, § 565.014.3(3), RSMo 1978. As petitioner properly notes, there is no constitutional requirement that this proportionality review exist, Pulley v. Harris, ___ U.S. ___, 104 S.Ct. 871, ___ L.Ed.2d ___ (1984).

Petitioner's claim that he was denied review is difficult to fathom, as the Missouri Supreme Court clearly found that the sentence was proportional, 661 S.W.2d at 525. His claim that no

¹Although this could be demonstrated by production of the state court records and briefs, it is also manifest from the fact that the present theory was not addressed in the opinion of the Missouri Supreme Court. Where "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary (citations omitted)." Street v. New York, 394 U.S. 576, 582 (1969).

review was undertaken is devoid of support in the record. Rather, it is clear that petitioner's real complaint is the result of the analysis of the Missouri Supreme Court. He cites numerous other Missouri cases where the death penalty was not received by the defendant.

In doing so, petitioner understandably fails to mention that besides the crime for which he was convicted, he has been found guilty of several other murders: petitioner was convicted of the murders of Clarence and Lottie Williams, State v. Gilmore, 650 S.W.2d 627 (Mo. banc 1983), although it should be noted that those convictions were reversed due to a typographical error in the indictment. Respondent would note that petitioner's confession to the murders of Mr. and Mrs. Williams, which was introduced at trial against him, is the subject of his main point before the Missouri Supreme Court. Petitioner has also been convicted of murder for the killing of Elizabeth Roderique, for which he received a life sentence, and was convicted for the murder of Woodrow Wilson Elliott, for which he also received the death penalty. The youngest of petitioner's five victims, Mr. Elliott, was 65-years-old and a dwarf paraplegic. The Missouri Supreme Court is well familiar with petitioner's many murderous attacks upon the elderly and defenseless, and although not explicitly mentioned by the court, this fact was clearly considered by the court in considering the "crime and the defendant." Section 565.014.3(3) (emphasis supplied). The fact that petitioner merely disagrees with the state court finding in regard to proportionality does not mean that a constitutional issue is raised. The decision of the Missouri Supreme Court regarding proportionality is one of state law, and no constitutional question is raised.

Finally, in regard to petitioner's claim that the death penalty is cruel and unusual punishment, as applied to him, respondent submits there are few cases where the death penalty is more deserved. Petitioner undertook a long, violent campaign against the old and helpless for the sole purpose of monetary

gain, which has resulted in five deaths. His assertion that he is being subjected to cruel and unusual punishment is frivolous and should be summarily dismissed.

CONCLUSION

For the reasons herein stated, respondent respectfully submits that the Petition for Certiorari be denied.

Respectfully submitted,

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CFRTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that a true and correct copy of the Respondent's Response to Petition for Writ of Certiorari in the case of George Clifton Gilmore v. State of Missouri was mailed, pursuant to Supreme Court Rule 28.59b), postage prepaid, this 16th day of March, 1984, to:

Lawrence C. Schmidt
Public Defender
23rd Judicial Circuit
Hillsboro, Missouri 63050

John M. Morris III
JOHN M. MORRIS, III by Sue Bower